Supreme Court, U.S.
FILED

No. 99 405 JUL 8 1999

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LUCIAN HUNTER HAY

Petitioner

VS.

EVIN WARD EVINS, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LUCIAN HUNTER HAY
Pro Se
318934 3E-128
P.O. Box 511
Columbus, Ohio 43216

(614) 877-0036

HSPR

QUESTIONS PRESENTED

1. IS TITLE 28 USC 1915 (E) (2) (B) (ii) UNCONSTITUTIONAL BECAUSE IT TREATS INDIGENT LITIGATES WHO FILE UNDER INFORMA PAUPERIS DIFFERENTLY UNDER THE LAW THAN THOSE PRO SE LITIGATES WHO ARE NOT INDIGENT BY DENYING THEM THE SAME RIGHTS AND IT IMPEDES OPEN AND EQUAL ACCESS TO THE COURTS?

2. DOES APPLYING TITLE 28 USC 1915 (e) (2) (B) (ii) RETROACTIVELY TO CASES FILED PRIOR TO THE ENACTMENT OF THE PRISONER LITIGATION REFORM ACT HAVE AN IMPERMISSIBLE RETROACTIVE EFFECT AS STATED IN LANGRAF VS. USI FILM PRODUCTS 114 S.CT. 1483, BECAUSE TO DO SO STRIPS FROM THE PETITIONER ESTABLISHED RIGHTS HE HAD AS A PRO SE INFORMA PAUPERIS LITIGATE TO BE TOLD OF THE DEFECTS OF HIS COMPLAINT AND TO BE GIVEN AN OPPORTUNITY TO AMEND HIS COMPLAINT BEFORE THE COURT COULD DISMISS FOR FAILURE TO STATE A CLAIM?

3. IF CERTIORARI IS GRANTED, PETITIONER WOULD ALSO SEEK TO DETERMINE A SUBSIDIARY QUESTION REGARDING THE RESPONDENTS:

DOES 1985 (3) STILL APPLY TO POLITICALLY MOTIVATED CONSPIRACIES TO MALICIOUSLY PROSECUTE SOMEONE IN LIGHT OF THE DECISION IN BRAY VS. ALEXANDRIA WOMEN'S HEALTH CLINIC 113 S. CT. 753?

LIST OF PARTIES

The Petitioner is Lucian Hunter Hay, who was the constitutionally elected Jailer of Franklin county, Kentucky at the time of the alleged actions of the Respondents, but is now a prisoner at Orient Correctional Institution, in Orient, Ohio.

The Respondents are:

Evin Ward Evins - Former Franklin County Regional Jail (FCRJ) employee
Jennifer Vest - Former FCRJ employee
Bill Read - Lieutenant, FCRJ
Tracy Frye Hopper - Former FCRJ employee
Marci Senn - Former FCRJ employee
Rob McCoy - Former FCRJ employee
Terry Smither - Former FCRJ employee
John Phillips - Former FCRJ employee
Raymond L. Smith - Attorney, Rogers, Fuller & Pitt, Louisville, Kentucky
George Wilding - Kentucky State Police
Mark Stapleton - Kentucky State Police
Jay Hancock - Kentucky State Police
Gerald Wilson - Kentucky State Police
Bob Foster - Special Agent, FBI, Frankfort, Kentucky

TABLE OF CONTENTS

Page

Question Presented . . . . . *i*
List of Parties. . . . . *ii*
Table of Contents . . . . . *iii*
Table of Authorities. . . . . *v*
Opinions Below. 1
Jurisdiction. 1
Statutes Involved. 2
Statement of the Case. 5
Reason for Granting the Writ. 8
A. Importance of Question Presented.... 8
Conclusion. 17

Appendix

	Page
Appendix -- Order of U.S. Court of Appeals Denying Rehearing	1a
Decision of the United States Court of Appeals	2a
Order of the United States District Court	19a

TABLE OF AUTHORITIES

Page

Cases:

Benson vs. O'Brian et al, (6/15/99) No. 98-3017. 13

Bell vs. Hood 66 SCT 773 (1946). 9

Bivens vs. Six Unknown Federal Narcotics Agents
91 SCT 1999 (1971). 2

Bray vs. Alexandria Women's Health Clinic
113 SCT 7532. . . . . *i*

Clark vs. Ocean Brand Tuna 974 F 2d 48 (6th. Cir.). . . 7

Coppedse vs. United States 82 SCT 917 (1962). 11

Douglas vs. DeBruyn 936 F Supp. 572
(S.D. Ind. 1996). 10

Franklin vs. State of Oregon, State Welfare Div.
662 F 2d 1337 (9th Cir. 1981). 12

Hagan vs. Lavine 94 SCT. 1372 (1974). 9

Hudson vs. McMillian 112 SCT 995 (1992). 12

Langraf vs. USI Film Products 114 SCT 1483. 15

Lewis vs. State of New York 547 F 2d 4
(2nd Cir. 1976). 12

Lopez vs. Smith 160 F 3d 567 (1998). 15

	Page
Mitchell vs. Farcass 112 F 3d 1483 (11 Cir. 1997).	9
Mooney vs. Holohan 294 U.S. 103 (1935).	16
Neitzke vs. Williams 109 SCT 1827 (1989).	9
Noll vs. Carlson 809 F 2d 1446 (9th Cir. 1987).	13
Potter vs. McCall 433 F 2d 1087 (9th Cir. 1984).	14
Rinaldi vs. Yeager 86 SCT 1497 (1966).	11
Tingler vs. Marshall 716 F 2d 1109 (6th Cir.).	12
U.S. vs. Agurs 427 U.S. 97 (1976).	16
U.S. vs. Bagley 473 U.S. 667 (1985).	16
U.S. vs. Giglio 405 U.S. 150 (1972).	16
U.S. vs. Napue 834 F 2d 1311.	16

TABLE OF STATUTES AND ACTS OF CONGRESS

42 U.S.C. 1983.	2
42 U.S.C. 1985 (2).	2
42 U.S.C. 1985 (3).	3
28 U.S.C. 1915 (d).	4, 11
28 U.S.C. 1915 (e) (2) (B) (ii).	4, 9
28 U.S.C. 1915 (A).	7
14th Amendment.	4

	Page
141 Congressional Record S14413-S14419 (Sept. 27, 1995)	10
141 Congressional Record S7525 - S7527 (May 25, 1995)	10
FRCP 12 (b)(6)	9, 10

Petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 12, 1999.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals (unpublished), the Order Denying Rehearing, the Order of the District Court for the Eastern District of Kentucky (unpublished), appear in the Appendix hereto, as Appendices A, B, C, respectively.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered April 12, 1999. This Petition for Certiorari is being filed within 90 days of that date (The clerk invoked rule 14. (5) on July 14, 1999. The petition is filed within 60 days of that date). Jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Civil Rights case was brought under 42 U.S.C. 1983, 1985 (1) (2) (3) and Bivens. The complaint was filed February, 1996 under 1915 (d) Informa Pauperis. Informa Pauperis was denied and the complaint was dismissed and Petitioner was ordered to pay the full filing fee if he refiled his complaint. The Petitioner refiled his complaint on April 1, 1996, paying the full filing fee and then applied for Informa Pauperis status as directed by the District Court. After the complaint was issued, the Magistrate Judge applied the Prison Litigation Reform Act retroactively 1915 (e) (2) (B) (ii) and dismissed the case Sua Sponte for failure to state a claim.

1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (Conspiracies are also chargeable under 1983).

Bivens: Bivens vs. Six Unknown Federal Narcotics Agents, 403 US 388, 91 SCT 1999 (1971).

Damage suits may be brought against Federal personnel in their individual capacity.

1985 (2) Obstructing Justice; Intimidating Party, Witness, or Juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more

persons conspire for the purpose of impeding , hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

1985 (3) Depriving Persons of Rights or Privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

1915 (d) Proceedings in forma pauperis

The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

1915 (e) (2) (B)

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -

(A) the allegation of poverty is untrue; or
(B) The action or appeal -
  (i) is frivolous or malicious;
  (ii) fails to state a claim on which relief may be granted; or
  (iii) seeks monetary relief against a defendant who is immune from such relief.

14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was the Constitutionally elected Jailer of Franklin County, Kentucky, when as he states, a politically motivated conspiracy was launched against him to maliciously prosecute him in Federal Court in retaliation for his outspoken testimony in opposition to Bills before the Kentucky General Assembly and his announced support of Larry Forgy, Republican candidate for Governor. Four months later, the investigation was launched. The Petitioner was charged with four counts of Obstruction of Justice for allegedly forcing staff members to file false affidavits in an inmate lawsuit. At trial, the Petitioner showed the Court that the Prosecution witnesses (disgruntled employees) had all fabricated the charges, conspired to commit perjury and the Petitioner was found innocent on May 23, 1995. Because of the blatant level of perjury and fabricated evidence, I requested that the United States Attorney investigate and charge them with perjury and lying to the FBI. They refused to prosecute their own witnesses. The Petitioner then discovered audio tape recordings that had been withheld by the prosecutor and the FBI, of the key Defendants plotting to frame the Petitioner for crimes they knew he did not commit in Federal Court. Other tape recordings revealed that some, if not all of the witnesses, were being paid for their testimony. Yet another tape recording revealed that State Police Detectives were involved in an attempt to have a witness lie to Federal investigators and that the State Police had knowingly provided the FBI with false and fabricated evidence. All of these audio tapes were recorded by respondent, Evin Evins. Based on statements by Evins, it is believed that Evins and the FBI still posses additional incriminating tapes that they continue to conceal. This was later backed up by State Police and FBI case reports and taped recorded interviews by the State Police. It was revealed in an FBI case report that the investigating agent in the case was aware of these tape recordings and withheld them from the Federal Grand Jury and knowingly presented known false and misleading information to the Grand Jury in order to maliciously prosecute the

Petitioner. Then withheld this information from the Defense and prosecuted the Petitioner knowing that all of his witnesses had lied to him and were conspiring to frame the Petitioner. FBI case reports and audio tape recordings reveal that civil attorney, Raymond Smith, was involved in the conspiracy to maliciously prosecute the Petitioner by fabricating evidence and obstructing justice and instructing his clients to lie to the FBI and commit perjury.

While there was a move to frame the Petitioner in Federal Court, there was also a move to frame the Petitioner in State Court. In a "shotgun" approach, the Special Prosecutor charged the Petitioner with charges ranging from giving staff time off to rape to see if anything would stick. The Special Prosecutor used many of the same disgruntled employees, who were already on tape saying they had been paid for their testimony and were planning to commit perjury and were conspiring together to frame the Petitioner in this highly politically charged case. Of course, this critical exculpatory evidence was withheld from the Defense, but was uncovered some six months after the Petitioner was convicted in State Court. Appeal on those charges is in the process of being presented to this Court. In the meantime, the Petitioner has become a prisoner of the State of Kentucky. Because of my position as Jailer for ten years and my years in law enforcement as a police officer, the State of Kentucky ordered me transferred to the State of Ohio Prison System and then decided to hold me incommunicado fearing for my safety. After the Petitioner received a letter from the United States Attorney, dated December, 1995, stating he would not prosecute his witnesses for their perjury and obstruction of justice, the Petitioner reluctantly proceeded to file this action to seek the justice he was being denied. The complaint was filed in February, 1996 informa pauperis. Informa pauperis was denied by the District Judge. The Petitioner was ordered that if he wished to refile his complaint, he must pay the full filing fee and then he could reapply to proceed informa pauperis. The Petitioner followed the District Judge's orders and refiled his complaint on April 1, 1996. After various motions by the Magistrate Judge to dismiss, which the

District Judge overruled, the District Judge ordered the complaint served on the named Defendants. Because the Petitioner was locked in a cell at the Reception Center in Orient, Ohio for nearly 23 hours a day for 5 months because of massive overcrowding and that Petitioner was only allowed access to the law library for a couple of hours once a week and denied any and all Kentucky Law Books and the fact that the Petitioner was being held incommunicado and as such could not request help from the law clerks in the law library, the Petitioner's complaint had some flaws. After being transferred to another facility where I could have more access to the law library, an inmate was murdered by members of the Aryan Brotherhood Prison Gang. This is the same gang that I had problems with as Jailer, which was one of the reasons that prompted Petitioner's move to Ohio. Petitioner was once again transferred when a guard told the inmates that I was a police officer. All of this greatly inhibiting the Petitioner's ability to draft and prosecute his claims. The Petitioner was forced to amend his complaint after realizing he had left out parts of his complaint, and later discovering the audio tape recordings that were withheld from the Federal Grand Jury, Court, Defense and the Jury, that captures Respondents/Defendants plotting to frame the Petitioner and captures County Judge Executive, Bob Arnold, scheming to use the power and prestige of his office to orchestrate and direct the malicious prosecution of the Petitioner. The Petitioner attempted to amend his complaint to add the claim of Civil RICO based on this new evidence. The Magistrate Judge ignored the evidence then promptly sua sponte dismissed the Petitioner's complaint by applying 28 U.S.C. 1915 (A) (screening) retroactively to the Petitioner's complaint stating he failed to state a claim on which relief could be granted. The District Judge concurred and dismissed the complaint with prejudice without giving the Petitioner an opportunity to amend his complaint, which was required prior to the enactment of PLRA. See Clark vs. Ocean Brand Tuna 974 F 2nd 48 (6th Cir. 1992). On appeal the Petitioner argued that it was impermissible to apply 1915 (A) retroactively to a case filed before the enactment of the Prison Litigation Reform Act, as it

stripped him of the **RIGHT** to amend his complaint to correct the defects for failure to state a claim and that 1915 (A) could not be applied because the complaint had already gone through a rigorous screening and the District Judge found the complaint to be valid and had ordered the complaint to be served on all Defendants. The three judge panel upheld the District dismissal 2 to 1 stating that 1915 (e)(2)(B)(ii) was the appropriate statue to dismiss the case under and the error was harmless. Circuit Judge Moore, however, ruled that the Petitioner had stated a claim in at least two areas and the case should not be dismissed.

BASIS FOR FEDERAL JURISDICTION

This case raises questions of constitutionality of one section of the PLRA, namely
1915 (e) (2) (B) (ii) and its violation of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution. The District Court had jurisdiction under 28 U.S.C. 1343 (3) and 28 U.S.C. 1331 (A).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Importance of the question presented:

This case presents a fundamental question of the Constitutionality of one section of the PLRA. That section is unconstitutional as it treats indigent Pro Se litigates who file under informa pauperis differently under the law than those Pro Se litigates who do not file informa pauperis by denying them the same rights and impedes

open and equal access to the Courts as guaranteed by the U.S. Constitution. Because the Petitioner feels that 1915 (e) (2) (B) (ii) is unconstitutional, it is also unconstitutional
to apply it to pending cases filed prior to the enactment of PLRA. The argument of the unconstitutionality of 1915 (e) (2) (B) (ii) is best articulated by Senior Circuit Judge Lay of the Eleventh Circuit Court of Appeals when in filing his decision in Mitchell vs. Farcass 112 F 3d 1483 at 1490-92. The Honorable Judge Lay wrote...

> "I write separately, however, to note my concern as to the constitutionality of 1915 (e) (2) (B) (ii), which allows sua sponte dismissal of an IFP complaint that fails to state a claim upon which relief may be granted...
>
> It is my view that in this section, Congress has deprived prisoners and other indigents of a signification procedural right that non institutionalized paying litigants enjoy, and has not provided a rational justification for this different treatment...
>
> Under the earlier version of the IFP Statute, the District Court was empowered and instructed to dismiss an IFP application sua sponte if it deemed the suit was frivolous or malicious. 28 U.S.C. 1915 (d) (1994). This rule was in accord with the established principle that a patently frivolous complaint may be dismissed for want of subject matter jurisdiction under Fed. R. Civ. P. 12 (b) (1). Neitzke vs. Williams 490 U.S. 319, 327 n. 6., 109 S. Ct. 1827, 1832 n. 6, 104 L.Ed.2d 338 (1989) (citing Hagans vs. Lavine, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974); Bell vs. Hood, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946)). The obvious rational basis for such peremptory action was that the government should not incur expenses in serving parties sued in frivolous actions. Thus, named defendants were typically not required to respond to these suits. See Neitzke, 490 U.S. at 324, 109 S.Ct at 1831 ("Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants

the inconvenience and expense of answering such complaints."). Section 1915 (d)'s successor, 28 U.S.C. 1915 (e) applied here to Mitchell's complaint, allows courts to dismiss a complaint sua sponte not only for frivolousness, but also for failure to state a claim on which relief can be granted.

28 U.S.C. 1915 (e) (2) (B) (ii). While courts have recognized that this seemingly innocuous change is a significant expansion of the court's power, see, e.g., Douglas vs. DeBruyn, 936 F. Supp. 572, 579 n. 4 (S.D. Ind. 1996), nothing in the legislative history of the statute indicates that Congress was aware of the real meaning of the change. See 141 Cong. Rec. S14413-S14419 (daily ed. Sept. 27, 1995); 141 Cong. Rec. S7525-S7527 (daily ed. May 25, 1995).

The difference between dismissal for frivolousness and dismissal for failure to state a claim was explained by the Supreme Court in Neitzke, which interpreted 1915 (d) of the old IFP statute. The Neitzke Court, as a matter of statutory interpretation, was critical of the district court in conflating the standards of frivolousness under the old 1915 (d) and failure to state a claim upon which relief could be granted. The Supreme Court observed that the error in doing so denied "indigent plaintiffs the practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules." 490 U.S. at 330, 109 S.Ct. at 1834.

Neitzke recognized that protection from sua sponte dismissal for failure to state a claim is a meaningful right: Under Rule 12 (b) (6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon.

These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to

respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. Id. at 329-30, 109 S.Ct. at 1833-34. The PLRA strips this right only from IFP litigants, denying them equality of treatment in the federal courts. See Id. at 330, 109 S.Ct. at 1834 (noting the unfairness in applying the failure to state a claim dismissal standard to 1915 (d), because an indigent litigant's complaint "whose only defect was its failure to state a claim, will in all likelihood be dismissed sua sponte, whereas an identical complaint filed by a paying plaintiff will in all likelihood receive the considerable benefits of the adversary proceedings contemplated by the Federal Rules"). This differential treatment cannot in my view be justified by the stated purposes of the PLRA - to deter frivolous prisoner litigation and ease the burden of such suits on the federal courts. The distinction between immediate dismissal for failure to state a claim and immediate dismissal for frivolousness, if not lost on the average litigant, surely will not weigh heavily in his or her decision whether to bring a claim. Easing the small bit of the courts' burden that is made up of complaints that are not frivolous but nonetheless fail to state a claim simply cannot be justified when weighed against the procedural right IFP litigants are denied. Depriving one group of this right while retaining it for another stands in stark opposition to established principles of equal access to courts for all litigants, which of course is the original purpose behind 28 U.S.C. 1915. See Coppedge vs. United States, 369 U.S. 438, 447, 82 S.Ct, 917, 922, 8 L.Ed.2d 21 (1962) (noting that the purpose of the IFP statute was "to assure equality of consideration for all litigants"); cf. Rinaldi vs. Yeager, 384 U.S. 305, 310,86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966) (ruling that judicial mechanisms like appellate

> review "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts"). In stating my objections, I recognize that there is no question that many prisoner suits are baseless. I also agree that the payment of a filing fee may well deter such suits. We should proceed with caution, however, in approving additional deterrence mechanisms that trample prisoner litigants' rights, for fear we lose sight of the purpose of prisoner litigation: to protect prisoners' constitutional rights, and to curb inhumane treatment and abuse of power in prison environments. See generally, e.g., Hudson vs. McMillian, 503 U.S. 1, 4, 112 S.Ct. 995, 997-998, 117 L.Ed.2d 156 (1992) (determining that prison guards who placed an inmate in handcuffs and shackle and beat him while their supervisor told them "not to have too much fun" used excessive force in violation of the Eighth Amendment).

The Sixth Circuit Court of Appeals ruled in 1893 in Tingler vs. Marshall 716 F 2d 1109, 1111,

> that sua sponte dismissal on the merits (failure to state a claim) without notice of the proposed dismissal to the Plaintiff to allow him to respond is not favored. "Such sua sponte dismissals are not in accordance with our traditional adversarial system of justice because they cast the District Court in the role of a "proponent rather than an independent entity". Franklin vs. State of Oregon, State Welfare Division, 662 F2d 1337, 1342 (9th Cir 1981). Moreover such dismissals are not favored because they are unfair to the litigants and ultimately waste, rather than save judicial resources. Lewis vs. State of New York, 547 F2d 4 (2nd Cir 1976)...Plaintiffs are prejudiced by the procedure followed by the District Court in this case because, unlike with motions to dismiss filed by

> Defendants, they have no opportunity to amend their complaints or make legal arguments against the dismissal. The prejudice is particularly acute with respect to Pro Se Plaintiffs, [like the Plaintiff in this case], who are generally unskilled in the art of pleading...finally the sua sponte dismissal most likely intended by the District Court as a device for judicial economy, actually results in the waste of judicial resources. Lewis, 547 F2d at 4."

The Honorable Judge Moore of the Sixth Circuit Court of Appeals just ruled in Benson vs. O'Brian et al. 6-15-99, No. 98-3017) that ("PLRA") took away the **RIGHT** that in forma pauperis litigates had to be told of the deficiencies and be allowed to amend their complaint prior to dismissal, but retained it for those who file the exact same complaint but not in forma pauperis. This was an interesting case where the District Court erroneously assumed that Benson had filed in forma pauperis and dismissed his case sua sponte. But Judge Moore and the entire panel ruled that Benson had not applied for in forma pauperis and therefore, his case could not be dismissed sua sponte and he must be given notice and an opportunity to amend his complaint. Ironically, Benson made the same claims as the Petitioner, 1983, 1985 and Civil RICO. This seems to make the Petitioner's case; that if you are indigent, you do not enjoy the same rights and access to the Courts in identical cases as those who can afford to pay, which is unconstitutional. Prior to the enactment of ("PLRA") the Ninth Circuit ruled similarly in Noll vs. Carlson 809 F2d 1446, 1448-49 (1987). However, in this case the Plaintiff had amended his complaint twice on his own initiative (as the Petitioner has done in the case at bar) and the Court still ruled that "the requirement that courts provide a Pro Se litigant with notice of the deficiencies in his or her complaint helps ensure that the Pro Se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the Pro Se litigant will likely repeat previous errors. This is equally true for the Pro Se litigant who amends his complaint at his instance without any guidance from the Court. Amendments that are made

without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings... When the District Court dismissed Noll's second amended complaint and the action without leave to amend, it failed to provide a statement of the complaints deficiencies. Because it is not clear that Noll could not amend his complaint to allege constitutional violations, the District Court erred by not notifying Noll of the amended complaint's deficiencies and allowing him leave to amend. See Franklin, 745 F2d at 1228 n 9: Potter, 433 F2d at 1088."

It has been firmly established that a Pro Se litigant has the right to be notified of the deficiency in his complaint and be given the opportunity to amend his complaint to correct them. This right was stripped from the Petitioner in this case by applying 1915 (e) (2) (B) (ii) retroactively to the Petitioner's case. (After screening and service on the Defendants, but before any evidence was produced to the Court to support the Petitioners claims, the Court dismissed for failure to state a claim. The fact that the statute as written and enforced only applies to those indigent litigants filing IFP and not to Pro Se paying litigants. It is unconstitutional because it violates the due process clause of the constitution denying equal access and protection to the Courts. If the Petitioner had not applied for informa pauperis status after pre paying the full filing fee, he would have had the right to be told of his deficiencies and been given the opportunity to amend his complaint to correct them See Appendix "A". While the Court ruled that it felt that even if it gave the Petitioner the opportunity to amend, he could not correct the complaint. This could not be true because the Honorable Judge Moore found that the Petitioner had stated a claim in at least two areas: that police officer Hancock, knowingly presented false evidence to FBI agent Foster and that special agent Foster knowingly presented known false evidence to the Federal Grand Jury and therefore, the case should not be dismissed. This certainly gives rise to the argument that - given the opportunity to amend - that BENSON, Id was given by Judge Moore, the Petitioner could have corrected his complaint in order to convince the remaining two members of the panel and certainly the District Court that his

entire complaint could be sufficiently plead and avoided dismissal. As the Neitzke Court ruled, that protection from sua sponte dismissal for failure to state a claim is a meaningful **RIGHT.** A right that has been stripped from those of us that are indigent and preserved for those who can pay.

If not unconstitutional - then applying 1915 (e)(2)(B)(ii) retroactively is impermissible under Langraf vs. USI film Products 114 S. Ct. 1483 because it **"impairs rights a party possessed when he or she acted."** Id at 280

This Court's review of the constitutionality of 1915 (e) (2) (B) (ii) is required, as many indigent litigants, like the Petitioner, are unconstitutionally having their cases dismissed simply on pleading technicalities in their complaints and those who can afford to pay are not.

The Ninth Circuit is currently wrestling with this very question in Lopez vs. Smith 160 F 3d 567 because the Court ruled that PLRA stripped IFP litigants of their right to amend but retained it for those who could pay. The full panel has now agreed to review the case en banc to decide the constitutionality of 1915 (e) (2) (B) (ii). This Court should use this case to resolve this issue for all the circuits.

Never, in all my years in law enforcement have I ever seen a case where the Respondents/Defendants were caught on audio tape cavalierly plotting to obstruct Justice, conspiring to commit perjury and lying to federal officers and openly brag without fear of repercussions , that he will use the political power and prestige of his office in this endeavor. To use that power to induce rogue police officers to knowingly frame an innocent man and attempt to place him in a federal prison for twenty years. All in the name of "Machiavellianism"! They continue to make a mockery of the Justice System. To have all this evidence on audio tape, but to have your case dismissed on an unconstitutional technicality is unthinkable. But this high court is not unfamiliar with hearing cases where a Petitioner had been denied by every court in the land - finally finding justice before this Honorable Court. Cases like the

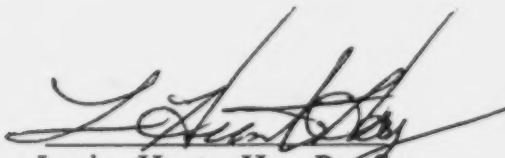
Petitioner, who claim he was framed and maliciously prosecuted: U.S. vs. Agurs 427 U.S. 97 (1976) (prosecutor failed his constitutional duty to disclose favorable evidence); Mooney vs. Holohan 294 U.S. 103 (1935) (prosecutors knowingly used perjured testimony); U.S. vs. Giglio 405 U.S. 150 (1972) and U.S. vs. Bagley 473 U.S. 667 (1985) (government withheld impeachment evidence as well as exculpatory evidence); U.S. vs. Napue 834 F 2d 1311 (prosecution is vindictive and violates due process if it is undertaken to punish a person for exercising a protected statutory or constitutional right). The Petitioner throws himself on the mercy of this high court to give him the justice he is being denied, to be able to present his case as any other person who had filed the same case but not under in forma pauperis. The Petitioner was framed and maliciously prosecuted in this case, just as he was on his state charges. The tapes that were withheld by the Prosecution now prove beyond any doubt, the Petitioner was framed on all counts.

The Petitioner would not clog up this Court's very limited and valuable time if it were not for the tape recordings and official police documents that prove that the Respondents/Defendants conspired to maliciously prosecute him. This Court should use this case to resolve whether 1915 (e)(2)(B)(ii) is unconstitutional as written and enforced for all the Circuit Courts.

CONCLUSION

For the foregoing reasons certiorari should be granted in this case.

Respectfully Submitted,



8-30-99
Date

Lucian Hunter Hay, Pro Se

Appendix A

97-5286
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lucian Hunter Hay Plaintiff-Appellant,	)	**Filed April 12, 1999**
v.	)	**ORDER**
Evin Ward Evins, Et Al., Defendants-Appellees.	)	

BEFORE: BOGGS, NORRIS, AND MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

se:/_____
Leonard Green, Clerk .

Appendix B

NOT RECOMMENDED FOR PUBLICATION
No. 97-5286
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lucian Hunter Hay, (Filed Feb. 2, 1999)
Plaintiff-Appellant,

v.

Evin Ward Evins; Jennifer Vest; Bill Reed; Tracy Frye Hopper; Marci Senn; Rob McCoy; Terry Smither; John Phillips; Raymond L. Smith, Jr.; George Wilding; Mark Stapleton; J. Hancock; Gerald D. Wilson; Bob Foster; Individually; Bob Foster; Officially; John/Jane Doe, Kentucky State Police Personnel; John/Jane Doe.
Defendants-Appellees.

) On Appeal from
) the United States
) District Court for
) the Eastern District
) of Kentucky
)
) **Opinion**
)
) **Not recommended for Full-Test Publication**

Sixth Circuit Rule 206 limits citation to specific situations. Please see rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Appendix B

Before:Boggs, Norris and Moore, Circuit Judges

Alan E. Norris, Circuit Judge.

Facts

Plaintiff is the former elected jailer for the Franklin County Regional Jail in Kentucky. In two separate 1995 state trials, juries convicted him of three counts of theft by deception, one count of intimidating a witness, two counts of rape, two counts of attempted rape, one count of sodomy, and six counts of sexual abuse, all based upon plaintiff's on-the-job conduct. As a result of his convictions, plaintiff was fined and sentenced to ten years in prison.

Following his convictions, plaintiff, acting pro se, filed a federal lawsuit against thirty-one defendants. In his initial complaint filed on April 1, 1995, and his amended complaint filed on April 22, 1996, plaintiff set forth numerous causes of action pursuant to 42 U.S.C. 1983, 1985 (1)-(3), & 1986 Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971).[1] Essentially, plaintiff alleged that he was the victim of an elaborate conspiracy orchestrated by Governor Paul Patton, a Democrat, and his supporters, aimed at undermining his ability to aid Patton's Republican opposition in the 1995 Governor's race. He named thirty-one defendants in his complaint, including members of the Federal Bureau of Investigation and a United States Attorney. These defendants allegedly participated in a conspiracy to have criminal charges brought against him. One defendant, Franklin County Judge/Executive Bob Arnold, was a close friend and political supporter of Patton's. Plaintiff claims Arnold was

---

[1]Plaintiff filed an application to proceed in forma pauperis (IFP) on February 12, 1996. Initially, he was denied IFP status. On August 5, 1996, however, after plaintiff paid the filing fee, the district court granted IFP status, waiving further costs.

promised a lucrative appointment if Patton won the governor's race.

Plaintiff alleged that Arnold knew that plaintiff was very popular in Franklin County and planned to run for County Judge/Executive in the next election. Arnold allegedly sought to have plaintiff removed from his office as county jailor to weaken his political standing and thereby undermine his ability to support Patton's opponent as well as his ability to challenge Arnold for the position of County Judge/Executive. Arnold allegedly pursued this plan by using his influence in the Patton campaign and the power of his office to promise jobs in exchange for assistance in helping to set up plaintiff on criminal charges.

On August 30, 1996, plaintiff tendered a second amended complaint that recited claims based upon the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1951-1968. Plaintiff based his RICO claims upon allegations that defendants conspired to have the criminal charges brought against him in order to get him out of office. He offered at least three reasons for the formation of the conspiracy: (1) his alleged support for the Republican gubernatorial candidate; (2) his lobbying against a juvenile justice bill pending in the Kentucky legislature; and (3) his intention to run for the position of Franklin County Judge/Executive. The matter initially came before a magistrate judge who, in an eighty-seven-page Report and Recommendation, advised the district court to dismiss plaintiff's lawsuit and to deny his motion to file a second amended complaint. In the magistrate judge's view, plaintiff failed to state a claim as to any of his causes of actions and some of the 1983 and Bivens claims may also have been barred by the statute of limitations. The district court adopted the Report and Recommendation as its opinion, sua sponte dismissed the case with prejudice, and denied plaintiff leave to filed the tendered second amended complaint.

Appendix B

ANALYSIS
I.
A.

This district court based its dismissal of plaintiff's complaint for failure to state a claim upon which relief may be granted upon 28 U.S.C. 1915 A (b)(1).[2] Section 1915 A applies only to prisoner complaints that seek redress from a governmental entity, officer, or employee. 1915 A(a).

---

[2]In relevant part, 1915 A provides:

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.-- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. 1915 A(a)-(b)

Appendix B

If a prisoner complaint contains any claims that do not fall within the scope of 1915 A, the district court must then examine the complaint under 1915 (e)(2).[3] See McGore vs. Wrigglesworth, 114 F. 3d 601, 608 (6th Cir. 1997). Section 1915(e)(2), unlike 1915 A, applies to cases involving non-government defendants. Id. It also authorizes the district court to dismiss a complaint sua sponte if it fails to state a claim upon which relief may be granted.

Plaintiff complaint names as defendants both government employees and individuals who are either officers nor employees of a government entity. Hence, the district court erred to the extent that it relied upon 1915 A(b). The court's error is harmless, however, because the requirements of 1915 (e)(2) overlap those of 1915 A(b). Id. Therefore, we may treat the district court's order as a dismissal pursuant to 1915 (e)(2).

B.

Section 1915 (e)(2) is a relatively recent addition to 1915. Congress enacted it as part of the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, 801-810, 110 stat. 1321

---

[3]Section 1915 (e)(2) provides:
Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

- **(A)** the allegation of poverty is untrue; or
- **(B)** the action or appeal--
  - **(i)** is frivolous or malicious;
  - **(ii)** fails to state a claim on which relief may be granted; or
  - **(iii)** seeks monetary relief against a defendant who is immune from such relief

28 U.S.C. 1915(e)(2)

(1996), which became effective April 26, 1996. Plaintiff argues that, because he filed his complaint before the effective date of the PLRA, the district court could not apply 1915(e)(2) and it thus erred by dismissing his case. To resolve this issue, we must decide whether

1915 (e)(2) applies to cases that were pending when the provision became effective

The Courts of Appeals for the Ninth and Eleventh Circuits have already addressed this issue and concluded that the provision is a procedural rule and applies to pending cases. See marks v. Solcum, 98 F.3d 494, 496 (9th Cir. 1996); Mitchell v. Farcass, 112 F.3d 1483, 1487 (11th Cir. 1997). We agree, for the reasons set forth below.[4]

In Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Supreme Court set forth an analytical framework for determining whether to apply a newly enacted law to pending cases. Under step one of the Landsgraf analysis, a court must determine whether Congress expressly prescribed the temporal reach of the provision. Id. at 280. If Congress made its intent clear, that intent governs. Id. at 264. If not, a court must then determine whether the provision "would have retroactive effect, i.e., whether it would [1]

---

[4]By contrast, the Seventh Circuit has held that 1915(e)(2) does not apply to cases filed before the enactment of the PLRA. See Hutchinson v. Spink, 126 F.3d 895, 899 (7th cir. 1997). In reaching this conclusion, the Hutchinson court relied upon two earlier cases dealing with PLRA provisions other than 1915 (e)(2) to hold that no provision of the PLRA applies retroactively. Id. Under Sixth Circuit precedent, however, we examine each provision of a statute separately to determine whether a particular provision applies retroactively. See Wright v. Morris, 111 F.3d 414, 418 (6th Cir.), cert. denied, 118 S. Ct. 263 (1997).

impair rights a party possessed when he acted, [2] increase a party's liability for past conduct, or [3] impose new duties with respect to transactions already completed." id. at 280. A provision has an impermissible retroactive effect if it "attaches new legal consequences to events completed before its enactment."[5] Id at

269-70. Courts must not apply a provision that operates retroactively to pending cases "absent clear congressional intent favoring such a result." Id. at 280.

A recent opinion from this court, Hadix v. Johnson, 143 F.3d 246 (6th Cir. 1998), pointed to a negative inference that some sections of the PLRA may not apply to pending cases since they are silent in that regard, while on section of the act specifically was made applicable by Congress to pending cases. Id. at 252. Our panel noted the Supreme Court's opinion in Lindh v. Murphy, 521 U.S. 320 (1997), which referred to a negative implication arising form the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). See Hadix, 143 F.3d at 252-53. We believe that the situation confronting the court in Hadix is distinguishable, however, and that any inference, arising by negative implication, that Congress intended that 1915 (e)(A) should not apply to pending cases, is considerably weakened by the circumstances involved in this appeal.

---

[5]A provision does not operate "retroactively" or have a "retroactive effect" "merely because it is applied in a case arising from conduct antedating the statute's enactment,. . . or upsets expectations based in prior law." Landgraf, 511 U.S.. at 269 (citation and footnote omitted). "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Id. at 270

Appendix B

In Hadix, this court determined that the attorney fee provisions of PLRA 803 do not apply to cases pending at the time of enactment. Id. at 254-56. In reaching this determination this court relied on the negative implication arising from the express retroactivity of PLRA 802, the plain language of 803, and the fact that applying the attorney fee provision of 803 would have an impermissible retroactive effect. See id. We believe, however, that the situation with regard to 1915 (e)(2), which was enacted as part of PLRA 804, is distinguishable.

First, as the Hadix court noted, the negative implication arising from the conjunction of PLRA 802 and 803 (and 804) is weaker than the implication that led to the Supreme Court in Lindh to hold that one section of the AEDPA does not apply to pending cases. See Hadix, 143 F.3d at 254. The implication is weaker here because, unlike the situation in Lindh, the subsection that explicitly provides that 802 shall apply to pending cases and raises the negative implication was inserted before the sections were combined into the PLRA. Second, unlike the attorney fee provisions at issue in Hadix, the language of 804 is not prospective. In fact, the mandate of 1915 (e)(2) that under certain circumstances "the court shall dismiss the case at any time" implies that the provision should be applied to pending cases. Finally, as we explain below, 1915 (e)(2) is procedural and has no impermissible retroactive effect.

Congress made no mention of 1915 (e)(2)'s temporal reach. Thus, under Landgraf, we must determine whether the provision would have retroactive effect. However, we emphasize that in light of Lindh, the judicial default rule governing retroactivity from Landgraf does not displace the normal rules of construction that apply in determining whether a statute's terms would produce a retroactive effect. See Lindh, 117 S. Ct. at 2062-63.

Appendix B

Section 1915 (d), the predecessor to 1915 (e)(2), provided that, "The court...may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 1915 (d). Section 1915 (d) differed from 1915 (e)(2) in two significant ways. First, 1915 (d), unlike 1915 (e)(2), did not grant the district court authority to dismiss a case sua sponte for failure to state a claim upon which relief may be granted. Although 1915 (d) did allow the court to dismiss a case for being "frivolous," a complaint that fails to state a claim upon which relief may be granted is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 331 (1989); Lawler v. Marshall, 898 F.2d 1196, 1198 (6th Cir. 1990). Second, while 1915 (d) provided only that the court "may" dismiss the case, 1915 (e)(2) provides that the court "shall" dismiss.

Because procedural rules regulate secondary rather than primary conduct, courts generally apply a new procedural rule to pending cases unless it would have a retroactive effect. See Landgraf, 511 U.S. at 275; Wright v. Morris, 111 F.3d 414, 419 n.6 (6th Cir.), cert. denied, 118 S. Ct. 263 (1997). "As a general rule, laws which fix duties, establish rights and responsibilities among and for persons...are 'substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws.' Black's Law Dictionary 1203 (6th ed. 1991), earlier edition quoted by Carota v. Johns Manville Corp., 893 F.2d 448, 450 (1st Cir. 1990). Section 1915 (e)(2) merely allows the district court to do on its own initiative that which Federal Rule of Civil Procedure 12(b)(6) would allow it to do after a motion. Given that 1915 (e)(2) does not fix duties, or establish rights and responsibilities, but instead merely prescribes the manner in which the court will screen its cases, the provision is a procedural rule. See Mitchell, 112 F.3d at 1487. Thus, 1915 (e)(2) applies to pending cases unless it has a retroactive effect.

Appendix B

Plaintiff argues that applying 1915 (e)(2) to his case would have a retroactive effect. He argues that prior to Congress' enactment of the PLRA, the district court could only have considered his complaint's sufficiency in response to a motion filed by defendants pursuant to Rule 12(b)(6), after which plaintiff could have amended his complaint in light of defendant's motion. However, this is not entirely true. First, even absent the PLRA, a district court has the power to sua sponte dismiss a case on the merits, but in doing so it must, inter alia, notify the parties of its intent to dismiss and allow the plaintiff an opportunity to either amend his complaint or respond to the district court's state rationale for dismissal. See Tingler v. Marshall, 716 F.2d 1109, 1112 (6th Cir. 1983). Second, plaintiff would not necessarily have been able to amend his complaint in response to a Rule 12(b)(6) motion by defendant. Although this circuit adheres to a policy of "liberality in allowing amendments to a complaint," Janikowski v. Bendix Corp., 823 F.2d 945, 951 (6th Cir. 1987), we have held that a district court may deny a motion to amend where, as here, the court finds that the proposed changes are futile, i.e., destined to fail.[6] See North American Specialty Ins. Co. v. Myers, 111 F.3d 1273, 1284 (6th Cir. 1997); LRL Properties v. Portage Metro Housing Auth., 55 F.3d 1097, 1104 (6th Cir. 1995); Vild v. Visconsi, 956 F.2d 560, 570 (6th Cir. 1992).

The issue comes down to this: whether 1915 (e)(2), in permitting the district court to sua sponte dismiss a complaint with an absolute bar on amendments to the complaint, constitutes a retroactive effect given the pre-PLRA Rule 12 (b)(6) procedure. Our short answer is no. We concede that applying 1915 (e)(2) to pending cases may negatively affect the plaintiffs in those cases.

---

[6]Under 1915 (e)(2), courts have no discretion in permitting a plaintiff to amend a complaint to avoid a sua sponte dismissal. See McGore, 114 F3d at 612.

That is not sufficient, however, for us to find that the procedural change implemented by 1915 (e)(2) impairs rights plaintiff possessed at the time he filed his complaint. In Landgraf, the Supreme Court noted that parties have a "diminished reliance interest in matters of procedure." Landgraf, 511 U.S. at 275 (citation and footnote omitted). To illustrate its point, the Court cited to Dobbert v. Florida 432 U.S. 282 (1977), in which it had held that retroactively applying a new procedural law that arguably made it easier to sentence a criminal defendant to death, did not constitute a violation of the Ex Post Facto Clause. See Landgraf, 511 U.S. at 275 n.28. Given this discussion in Landgraf, we must conclude that the term "rights" as used by this Court in Landgraf does not encompass mere expectation interests under procedural rules. Accord Mitchell, 112 F.3d at 1487. Therefore, since plaintiff had nothing more than an expectation that he would be able to amend his complaint, we hold that 1915 (e)(2) curtailment of this expectation does not constitute retroactive effect and that 1915 (e)(2) thus applies to pending cases. Accord Mitchell, 112 F.3d at 1487; Marks, 98 F.3d at 496.

II.

Given that 1915 (e)(2) applies to this case, we now must determine whether the district court properly dismissed plaintiff's complaint pursuant to that provision. We review de novo the district court's decision to dismiss under 1915 (e)(2). See McGore, 114 F.3d at 604. Plaintiff's complaints set forth causes of action pursuant to 42 U.S.C. 1983, 1985(1)-(3), and 1986, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and 18 U.S.C. 1951-1964. The causes of action based upon 18 U.S.C. 1951-1964 were raised only in the proposed second amended complaint which the district court denied plaintiff leave to file. Even when construed liberally, none of plaintiff's allegations bring his claim within the ambit of RICO'S prohibitions against

participating in a pattern of racketeering activity by conspiring to violate federal laws. There is no claim as to a specific enterprise, or acts that would constitute the necessary pattern under Sedima. S.P.R.L. v. Inrex Co., 473 U.S. 479, 496 n.14 (1985). Furthermore, the district court was obligated to deny plaintiff's motion to amend after it determined that the complaint was subject to sua sponte dismissal pursuant to 1915 (e)(2). See McGore, 114 F.3d at 612. Accordingly, the district court properly denied the motion to amend. The magistrate judge concluded, and the district court agreed, that plaintiff failed to state a claim upon which relief can be granted for the remaining causes of actions. We agree for the reasons stated by the magistrate judge in his exhaustive Report and Recommendation that plaintiff's allegations fall far short of required pleading standards. See Nuclear Transport & Storage, Inc. v. United States, 890 F.2d 1348, 1354-55 (6th Cir. 1989). The district court also adopted the magistrate judge's conclusion that the 1983 and Bivens action were barred by the statute of limitations. Because we hold that plaintiff failed to state a claim for these causes of action, we need not decide whether they were also time barred.

III.

Finally, plaintiff argues that the magistrate judge improperly relied upon ex parte communications in the Report and Recommendation to the district court, and that the district court, by adopting it, also improperly relied on those communications. The magistrate's Report and Recommendation does reference some of plaintiffs state convictions, as well as indictments brought against him and the subject matter of prior civil litigation. Federal Rule of Evidence 201, however, permits courts to take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid.201 (b)(2). The facts of which the magistrate and

district judges took judicial notice fall within the scope of Rule 201 and thus do not provide a grounds for reversal. See Rodic v. Thistledown Racing Club, Inc. 615 F.2d 736, 738 (6th Cir. 1980).

CONCLUSION

The judgment of the district court is affirmed.

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part.

Because Hay was proceeding in forma pauperis ("IFP") when the district court dismissed his case, I agree that 28 U.S.C. 1915 (e)(2), which permits the district court to dismiss certain actions sua sponte, was applicable, and thus I concur in Part I of the majority opinion. I do not believe, however, that all of Hay's claims were properly dismissed pursuant to 1915 (e)(2), and thus I dissent from the majority's holding in Part II.

Although Hay initially had been denied IFP status, the majority correctly recognizes that Hay was proceeding IFP on February 21, 1997 when the district court dismissed his case. It is important that Hay was proceeding IFP at this juncture because, despite dicta in our case of McGore v. Wrigglesworth, 114 F.3d 601, 604-605, 608 (6th cir. 1997), it is clear that 1915(e)(2) is applicable only to cases in which the plaintiff proceeds IFP.

The PLRA extensively revised 1915, which governs "[p]roceedings in forma pauperis." Section 1915 (e) reflects the revision and renumbering of former 1915(d), and revised 1915 (e)(2) provides that [n]otwithstanding any filing fee, or any portion

thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who

is immune from such relief.

The Supreme Court has held that the predecessor section applied only to IFP actions, and the PLRA revisions do not affect this holding. Referring to former 1915 (d), the Supreme Court held that a dismissal under this section was "not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute, [and thus] the dismissal does not prejudice the filing of a paid complaint making the same allegations." Denton v. Hernandez, 504 U.S. 25, 34 (1992). The PLRA revised this section to make dismissal mandatory and to make it clear that the payment of fees does not negate the applicability of 1915 9(e)(2) to cases in which the plaintiff proceeds IFP. The phrase "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid" should be interpreted, however, as meaning "notwithstanding fees paid pursuant to 1915 (b)"[1] or, as in Hay's case, "notwithstanding fees paid previous to the grant of IFP status." There is no indication in the legislative history or in the structure of the Act that the new preamble referring to the payment

---

[1]Section 1915(b) requires prisoners who bring civil actions or appeals IFP to pay the filing fee over time and provides a mechanism for the assessment and collection of the fee from the prisoner's trust account.

of filing fees was meant to convert this IFP screening provision into a general screening device applicable to all actions before the district court.

The structure of this subsection further indicates that it is directed only at IFP actions. Under 1915 (e)(2)(A) "the case" may be dismissed because of a false allegation of poverty. Clearly, "the case" must be an IFP case for the purposes of subsection A, and it would be anomalous to hold that it could be otherwise for the purposes of subsection B. It is also noteworthy that no other part of 1915 has been held to apply to non-IFP actions.

Moreover, a panel of this court has recognized that IFP status provides the district court with the power to dismiss a complaint sua sponte, see Hardy v. Michigan, No. 96-2540, 1997 WL 778160 (6th Cir. Dec. 9, 1997) (unpublished disposition), and the other circuits that have addressed the question agree that 1915(e)(2) applies only to IFP actions. See Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir.) ("As Appellant was not proceeding in forma pauperis, his complaint count not be dismissed pursuant to 1915 (e)(2)."), cert. denied, ---U.S. ---, 119 S. Ct. 156 (1998); Marks v.Solcum, 98 F3d 494, 495 (9th Cir. 1996) (" 1915(e)(2)...applies to prisoner proceedings in forma pauperis"); see also Porter v. Fox 99 F.3d 271. 273 n.1 (8th Cir. 1996).

For the foregoing reasons, district court "screening" pursuant to 1915 (e)(2) is permissible only in cases in which the plaintiff proceeds IFP. In the present case, of course, Hay was proceeding IFP, and the 1915 (e)(2) screen was available to the district court. Thus, I turn to de novo consideration of the question of whether Hay's claims were properly dismissed under this section.. See McGore, 114 F.3d at 604.

The magistrate judge complained of the "shotgun" pleading approach employed by Hay, and he concluded that the pleadings were deficient as they failed to allege that specific conduct of the defendants deprived Hay of specific constitutional rights. This

finding was adopted by the district court and affirmed by the majority of this court. I conclude, however, that at least two of Hay's claims were adequately pleaded and should not have been dismissed pursuant to 1915 (e)(2).

In paragraph forty-four of his initial complaint Hay asserts that FBI Agent Foster knowingly brought false charges against Hay in violation of Hay's Fifth Amendment rights, and in paragraph forty-one of his first amended complaint Hay expands on this assertion and directly alleges a violation of his right to due process. In paragraphs thirty-three and thirty-four of the initial complaint Hay alleges specifically that Foster was told by James Loy that co-defendant Evins had lied in earlier testimony, that Foster refused to interview a witness that Loy told him would corroborate his account, and that Foster knowingly presented this false evidence to the grand jury. This allegation is specific, it connects Foster with the alleged offenses, and it is more than adequate to enable the court to assess and reject Foster's qualified immunity defense, as no reasonable officer could believe that knowingly presenting false evidence to a grand jury would not violate the defendant's Fifth Amendment rights.

Similarly, paragraph twenty-two of the initial complaint alleges that police officer Hancock knowingly presented false evidence to FBI Agent Foster. Hay claims that an interview tape contradicts the account of Louis Weber's testimony that Hancock provided to Foster and that Foster recorded in his case report. Again the allegation is specific, it connects Hancock with the alleged offense, and it is sufficient to assess and reject the qualified immunity defense. The facts of this paragraph are converted into a legal claim in paragraph thirty-five of the initial complaint and paragraph forty-one of the first amended complaint, which assert violations of Hay's Fourteenth Amendment rights. Moreover, as Hancock was acting in his official capacity in providing evidence to the FBI, the state action requirement is obviously satisfied.

Appendix B

In my opinion a number of Hay's other allegations were of questionable sufficiency, while many were plainly insufficient and were subject to dismissal. I cannot agree with the majority, however, that the preceding two allegations "fall far short of the required pleading standards." Ante at ---.

Finally, because I conclude that these allegations were sufficiently pleaded, I, unlike the majority, must address the statute of limitations issue. Kentucky law places one-year limitations period on 1983 and Bivens actions. See Collard v. Kentucky Bd. of Nursing, 896 F.2d 179, 182 (6th Cir. 1990). Federal law, however, determines when a cause of action has accrued. See id. at 183. The allegations described above are analogous to a common law claim of malicious prosecution, and the cause of action for a Bivens or 1983 claim based on malicious prosecution does not accrue until the underlying criminal action is terminated in favor of the accused. See Heck v. Humphrey, 512 U.S. 477, 489-90 (1994); McCune v. City of Grand Rapids, 842 F.2d 903, 907 (6th Cir. 1988). As Hay was acquitted of the federal obstruction of justice charges on May 23, 1995 and filed the present action on April 1, 1996, I conclude that his claims are not barred by the one-year limitations period.

Because some of Hay's allegations were sufficiently well pleaded and because these claims were not time barred, I conclude that the district court erred in dismissing Hay's claims in their entirety. Thus, I respectfully dissent form the majority's affirmance of that dismissal.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 96-14 **FILED FEB. 24, 1997**

LUCIAN HUNTER HAY **PLAINTIFF**

V. **ORDER**

EVIN WARD EVINS, ET AL., **DEFENDANTS**

* * * * * * * *

This matter is before the Court upon the Report and Recommendation of United States Magistrate Judge James B. Todd [Record No. 74]. The Magistrate Judge has recommended that this action be dismissed, sua sponte, with prejudice, pursuant to U.S.C. 1915 (a). The plaintiff has objected [Record No. 78]. The defendants, Evin Ward Evins, Jennifer Vest, Bill Reed, Tracy Frye Hopper, Marci Senn, Rob McCoy, Terry Smither and John Phillips, have responded [Record No. 79], stating that the plaintiff has asserted no facts which support his objections and asking the Court to adopt the Magistrate Judge's Report and Recommendation.

The Magistrate Judge has made a thorough, detailed, and well-researched analysis of the plaintiff's claims in this matter. After evaluating each separate claim of the plaintiff's in his eighty-seven (87) page Report and Recommendation, the Magistrate Judge found that the plaintiff had not stated any cognizable or meritorious claims, and thus, this matter should be dismissed with prejudice. The plaintiff put forth exceptions attempting to substantiate his claims so as to be cognizable and/or meritorious. Instead, however, the plaintiff has once again bombarded the Court with more conclusory allegations and no valid

evidence which would cause the Magistrate Judges' Report and Recommendation to be unfounded. Thus, this Court finds that the plaintiff has not presented any cognizable or meritorious causes of action in this matter and this case should therefore be dismissed as recommended.

Accordingly,

IT IS ORDERED as follows:

(1) The Magistrate Judge's Report and Recommendation [Record No. 74] be, and the same hereby is, **ADOPTED** as and for the opinion of the Court.

(2) The Plaintiff's motion to file a second amended complaint [Record No. 51] be, and the same hereby is, **DENIED**, as it has been considered in the Magistrate Judge's Report and Recommendation and as it contains no new allegations which save this action from being dismissed.

(3) The numerous pending motions [Record Nos. 43, 54, 56, 62, 63, 65, 66, 70, 71, & 72] be, and the same hereby are, **DENIED AS MOOT.**

(4) This matter be, and the same hereby is, **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court's active docket.

(5) This Court certifies that any appeal of this order would no be taken in good faith.

This the 21st day of February, 1997.

s:/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: